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Reopenings and Modifications in West Virginia Workers' Compensation Claims: A Practitioner's Guide

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REOPENINGS AND MODIFICATIONS IN WEST VIRGINIA WORKERS' COMPENSATION CLAIMS: A PRACTITIONER'S GUIDE

BRADLEY A. CROUSER*

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I. BACKGROUND

One of the few exceptions to the doctrines of res judicata and collateral estoppel is in the area of workers' compensation law. All

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states have provisions for changing "final" rulings in workers' compensation claims, sometimes long after a judgment or final order has been entered.¹ The ability to reopen or modify workers' compensation claims, as noted by Professor Arthur Larson in his treatise, is a recognition of the fact that no matter how competent the evaluation of a claimant's condition and earning prospects may be at the time of the initial hearing, the condition and earning prospects may later improve or change markedly for the worse.²

Claim reopening cases represent a large portion of workers' compensation litigation in West Virginia. For example, of the 41,312³ computer-generated protest acknowledgment letters⁴ issued by the West Virginia Workers' Compensation Fund between January 1, 1988 and September 30, 1989, 8.8% (3,664) pertained to reopenings.⁵ Additionally, an estimated 40% of the computer-generated protest acknowledgments during that period related to permanent partial disability (PPD) awards.⁶ Most of those protests resulted from reopenings not initially in litigation, but which subsequently were protested after the PPD award was made.⁷

The power and jurisdiction of the West Virginia Workers' Compensation commissioner (hereinafter "commissioner") over each

1. 3 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 81.0 (1988).

2. *Id.*

3. Interview with John E. Farley, Director of Medical Case Management, West Virginia Workers' Compensation Fund, in Charleston, West Virginia (December 15, 1989) [hereinafter Farley Interview].

4. W. VA. CODE § 23-5-1 (1985 & Supp. 1989) requires that the commissioner give notice in writing to the employer, the claimant or dependent, as the case may be, of his action, and allow thirty days upon receipt of such notice for written objection to such findings before the order becomes final. If an objection is made, the claim then goes into litigation. Hence, the term "protest letter," and "protest acknowledgment letter."

5. See Farley Interview, *supra* note 3.

6. Permanent partial disability awards are typically made by the commissioner after the claimant has reached his maximum degree of medical improvement, as determined by a physician. The PPD award is based on the percentage of the claimant's "whole-man impairment," either based on the statutory tables set forth in W. VA. CODE § 23-4-6(f) (Supp. 1989), or on the opinion of the expert medical evaluator(s). A PPD of 85% or more is statutorily deemed a permanent total disability. *Id.* § 23-4-6(d). The PPD award is computed on the basis of four weeks' compensation for each percent of disability determined, not to exceed 66 2/3% of the average West Virginia weekly wage. *Id.* § 23-4-6(e).

7. In addition to the computer-generated protest acknowledgments, the Fund generates an unquantified amount of personally-generated protest acknowledgments, primarily originating from the Legal Division.

workers' compensation case is continuing.⁸ The commissioner has the right, after due notice to the employer, to make any changes of former findings or orders "as may be justified."⁹

The statute allows both the claimant and the employer to petition for a change in any workers' compensation award, even after an order has been entered by the commissioner.¹⁰ (For purposes of this article, actions by the claimant for such change will be referred to as "petitions or applications for reopening," and actions by the employer will be referred to as "applications for modification.")

Typically, the claimant petitions to reopen his claim for an additional PPD award or for additional temporary total disability (TTD) payments.¹¹ He may also seek to reopen his claim because he believes he is entitled to medical benefits for his injury,¹² to vocational or physical rehabilitation benefits,¹³ or to a permanent total disability (PTD) award.¹⁴

8. *Id.* § 23-4-16 (1985).

9. *Id.*

10. *Id.* §§ 23-5-1a, 23-5-1c.

11. Upon a finding that a claimant has sustained a compensable injury (a personal injury received in the course of and resulting from his covered employment, as set forth in *Id.* § 23-4-1 (Supp. 1989)) which causes disability lasting longer than three days, the commissioner commences payment of temporary total disability payments, which continues until the claimant has reached his maximum degree of improvement. Even if the claim previously has been closed for TTD benefits or the claimant has been awarded a PPD, the commissioner must commence payment of TTD benefits again, if the claimant suffers further TTD or requires further medical or hospital treatment resulting from the compensable injury giving rise to the former award. *Id.* § 23-4-1c(e). The claimant receives 70% of his average weekly earnings as his TTD benefits, not to exceed the average weekly wage in West Virginia, but not less than one-third of the average weekly wage in West Virginia. *Id.* § 23-4-6(a).

12. Payment for medical and hospital treatment is set forth in *Id.* § 23-4-3(b) (Supp. 1989). A claimant is entitled to payment of medical and hospital treatment which relates to his compensable injury if he needs such treatment, even if his claim has been previously closed. *Id.* § 23-4-1c(e).

13. The statute provides for physical and vocational rehabilitation of a workers' compensation claimant who has sustained a permanent disability or injuries likely to result in permanent disability. Total expenditure for vocational rehabilitation cannot exceed \$10,000, but the claimant is entitled to TTD benefits while he is undergoing vocational or rehabilitative treatments. *Id.* § 23-4-9 (1985).

14. A claimant is deemed to be permanently and totally disabled if he: (i) has a permanent disability rating of 85% or more, *id.* § 23-4-6(d) (Supp. 1989); or (ii) has lost sight in both eyes, lost the use of both hands or both feet, or one hand and one foot. *Id.* § 23-4-6(m). In making such a determination, whether the claimant has a disability which renders him "unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time . . ." is also

The statute requires only that a claimant's application be filed in writing and within the applicable time limits.¹⁵ It also requires the commissioner to pass upon the merits of the application within thirty days after its filing.¹⁶

Likewise, an employer may seek modification of a claim. This is typically done when there is evidence that a claimant on TTD has reached his maximum degree of medical improvement.¹⁷

II. THE APPLICATION PROCEDURE

Both the petitions for reopenings and modifications are filed with and considered by the commissioner.¹⁸

A. Reopenings

Currently, a claimant uses a WC Form 125 to petition for a reopening of his claim. Frequently, the application will be accompanied by supplemental medical reports, hospital admission records, x-rays, etc., to strengthen his argument that his claim should be reopened. This is the stage at which the claimant attempts to establish a "prima facie cause" for reopening his claim or presents a new fact to the commissioner not previously considered.¹⁹ "Prima facie cause" means "any evidence which would tend to justify, but not to compel, the inference that there has been a progression or aggravation of the former injury."²⁰

considered, *Id.* § 23-4-6(n).

Claimants often seek what is commonly referred to as "Second Injury life awards" under the provisions of *Id.* § 23-3-1 (1985), when they have definitely ascertainable physical impairment caused by a previous injury or injuries or compensable disease which, in combination with the compensable "second" injury, causes them to be permanently totally disabled through the combined effects of both. In the case of a Second Injury life award, the employer is charged only for the PPD due to the "second" injury, with the remainder of the PTD award charged to the Second Injury Reserve Fund. *Id.*

15. See *infra*, Ch. IV, § B.

16. See *Eggleton v. State Workmen's Compensation Comm'r*, 158 W. Va. 973, 214 S.E.2d 864 (1985).

17. See *infra* Ch. III, § B.

18. W. VA. CODE §§ 23-4-16, 23-5-1a, 23-5-1c (1985).

19. *Id.* § 25-5-1b.

20. *Harper v. State Workmen's Compensation Comm'r*, 160 W. Va. 364, 370, 234 S.E.2d 779, 783 (1977).

Upon receipt of the claimant's application form, the commissioner provides the employer with a written notification that the claimant wants to reopen his claim and whether or not he has established a prima facie cause for reopening. If the claimant has met this burden, the employer is advised by this notice that the commissioner will reopen the claim for TTD benefits within ten days unless the employer demonstrates just cause, in writing, why the claim should not be reopened.²¹

The "10-day notice"²² provides the employer with an opportunity to submit medical or other evidence in rebuttal. That evidence may question the timeliness of the claimant's petition, show that his disability is due to a cause other than a compensable injury, demonstrate that he is not temporarily disabled, or assert any number of applicable reasons to support the employer's position that the claim should not be reopened.

After consideration of any evidence from either party, from the claim file, or an independent evaluator, the commissioner then issues a written protestable order²³ which either reopens the claim or denies the claimant's petition to reopen. Each party has thirty days in which to file its objections in writing to this protestable order.²⁴ The commissioner is then required to schedule a hearing on this order²⁵ within thirty days after the objection is filed.²⁶ The hearing must be held at the county seat of the county in which the injury occurred or in any place agreed upon by the parties.²⁷

21. The commissioner's rules require that reopening petitions for PPD must be ruled upon within ten working days from the receipt of the petition by Worker's Compensation Fund personnel. 85 C.S.R. 6-4.6(a) (1986). There is no necessity for an advance evidentiary hearing for the commissioner to take action on a reopening petition. The commissioner can base his action, instead, on the information supplied by the parties or on medical evaluation reports he has obtained independently. *Honaker v. State Workmen's Comp. Comm'r*, 298 S.E.2d 893, 896 (W. Va. 1982). (citing *Mitchell v. Workmen's Comp. Comm'r*, 163 W. Va. 107, 107, 256 S.E.2d 1, 4 (1979)).

22. 85 C.S.R. 6-4.6(a) (1986).

23. W. VA. CODE § 23-5-1 (Supp. 1989).

24. *Id.*

25. *Id.*; *Mitchell*, 163 W. Va. at 120, 256 S.E.2d at 10.

26. W. VA. CODE § 23-5-1 (Supp. 1989). It should be noted that hearings are rarely held this soon.

27. *Id.* The hearing may be postponed by agreement of the parties or by the commissioner "for good cause." *Id.* Supplemental hearings are permitted, and typically do occur, often in various locations, depending on where the evaluating physicians practice.

The hearing process allows parties to present expert medical evaluations and reports, supply other relevant evidence, cross-examine witnesses including the claimant, etc.²⁸ At the first hearing or at a subsequent hearing,²⁹ the claim is "submitted" by both parties for a decision by the commissioner. The commissioner then has thirty days in which to render a "final order," either affirming, reversing, or modifying his former action.³⁰ Either party then has thirty days in which to appeal that "final order."³¹

The procedure for petitioning for a reopening for additional PPD benefits is essentially the same as that provided for TTD reopenings, except that the commissioner has thirty days, instead of ten, in which to respond to the petition.³² Typically, the PPD reopening petition is based upon a report by a physician selected by the claimant, who recommends a percentage of impairment higher than that previously granted. If the petition meets the requirements of the statute,³³ the commissioner enters an order holding that a prima facie cause for reopening for additional PPD has been made and will then refer the claimant to an independent physician of the commissioner's choosing for an examination.³⁴ Upon receipt of that physician's report, the commissioner enters a protestable order, either granting the claimant additional benefits or finding him fully compensated by the earlier award(s).

Litigation and appeal procedures for final orders pertaining to PPD reopenings, as well as reopenings for PTD, medical benefits,

28. The employer is entitled to obtain the claimant's medical records for litigation purposes under W. VA. CODE § 23-4-7(b) (1985).

29. The commissioner's rules allow the objecting party one year from the date of acknowledgment of the protest in which to complete its presentation of evidence. Subsequent to the objecting party resting its case, the defending party or parties have another year in which to present rebuttal evidence, and the commissioner may extend this two-year period for good cause. 85 C.S.R. 7-2.11(b) (1986). Note that this rule is much less vague than the hearing continuance procedures set forth in W. VA. CODE § 23-5-1 (Supp. 1989). Until recent months, the "One-Year Rule" has not been strictly enforced.

30. W. VA. CODE § 23-5-1 (Supp. 1989).

31. *Id.* The appeal process is discussed *infra* Ch. V, § C.

32. 85 C.S.R. 6-4.6(b).

33. *See infra*, Ch. III, § A.

34. It is the commissioner's responsibility to determine the percentage of disability to award a claimant by examining the physicians' findings and determining from such reports the amount of existing disability. *Haines v. Workmen's Compensation Comm'r*, 151 W. Va. 152, 155-56, 150 S.E.2d 883, 885-86 (1966).

and vocational or physical rehabilitation, are the same as for TTD reopenings.

B. Modifications

The employer may also make an application in writing for a modification of any award previously made.³⁵ Although the statute makes reference to “*any* award previously made,”³⁶ an employer typically makes an application for modification to terminate ongoing TTD benefits.

In such cases, an employer will usually file an application based on an expert medical opinion stating that the claimant has reached his maximum degree of medical improvement. For example, documentation is sometimes provided which demonstrates that the claimant is engaging in activities inconsistent with his alleged injury. Occasionally, some new evidence not previously considered by the commissioner, such as evidence demonstrating that the claimant is disabled due to some non-occupational or pre-existing condition, may become available and serve as grounds for an application for modification.

In addition to considering the material contained in the employer's request for termination of TTD benefits, the commissioner is required to consider information provided by the claimant. Additionally, the commissioner may rely on information already in the claimant's file, and may direct the claimant to undergo an independent medical evaluation before a determination is made on the employer's application.³⁷ In any event, if the employer's application discloses “cause for further adjustment”³⁸ of the claimant's benefits, the commissioner is required, after due notice to the claimant stating

35. W. VA. CODE § 23-5-1c (1985).

36. *Id.* (emphasis added.).

37. *Mitchell v. State Workmen's Compensation Comm'r*, 163 W. Va. 107, 120, 256 S.E.2d 1, 10-11 (1979).

38. W. VA. CODE § 23-5-1c (1985).

the factual basis therefor,³⁹ to make such modification with respect to the former orders "as may be justified."⁴⁰

Any party dissatisfied with the modification order is entitled, upon timely and proper objection, to a hearing.⁴¹ If an application for modification is denied, the commissioner must issue a protestable order within sixty days and the employer has thirty days thereafter in which to file a written objection.⁴²

It should be noted that in situations in which the employer has failed to protest the original TTD order, it cannot protest subsequent TTD orders. Instead, its remedy is to file an application for modification.⁴³

Where an employer's application for modification is successful and TTD benefits are terminated, those benefits cannot be terminated retroactively; the termination is effective as of the date of the commissioner's order.⁴⁴ The date of termination usually is subsequent to a physician having found that the claimant has reached his maximum degree of medical improvement.

III. THE GROUNDS FOR CHANGES

The West Virginia Supreme Court of Appeals (hereinafter "court") generally has interpreted the jurisdictional provisions of the statute strictly with respect to parties seeking changes in workers' compensation awards. The court has held that the commissioner's final order cannot be modified or vacated except by a proper appeal or by a petition for reopening.⁴⁵ The commissioner has no power

39. *Yacomolish v. State Compensation Comm'r*, 110 W. Va. 79, 157 S.E. 45 (1931). No evidentiary hearing is required upon an application for modification of TTD benefits before those benefits are terminated. *Mitchell*, 163 W. Va. at 122, 256 S.E.2d at 11. Procedural due process standards mandate, however, that the commissioner give the claimant advance notice of the reasons why his TTD benefits may be terminated and give him a reasonable opportunity to supply relevant information on the issue. Such notice is not required, where the claimant has returned to work. *Honaker v. State Workmen's Compensation Comm'r*, 298 S.E.2d 893, 894 (W. Va. 1982).

40. W. VA. CODE § 23-5-1c (1985).

41. *Id.*

42. *Id.* § 23-5-1d.

43. *Butcher v. State Workers' Compensation Comm'r*, 315 S.E.2d 563, 565 (W. Va. 1983).

44. *Fakourey v. Workmen's Compensation Comm'r*, 163 W. Va. 551, 554, 258 S.E.2d 526, 528 (1979).

45. *Dismond v. State Compensation Comm'r*, 148 W. Va. 26, 31, 132 S.E.2d 743, 746 (1963).

or jurisdiction to vacate, set aside, or modify a final order unless it appears that he originally lacked jurisdiction to enter the order or that it was procured through fraud or mistake.⁴⁶ A "mistake" of the magnitude to justify setting aside an award must be something more than an erroneous decision by the commissioner.⁴⁷

A. *Reopenings*

The reconsideration of a claimant's prior award cannot be based on evidence substantially the same as that which was before the commissioner when the claim was closed.⁴⁸ Facts which were in the record at the time of the initial award are treated as already having been considered by the commissioner.⁴⁹

It is not sufficient for the claimant merely to show that he has a disability greater than that for which he was compensated by the original award.⁵⁰ For example, the court has held that if there was evidence of a particular type of disability before the commissioner at the time of the original award, such as psychiatric disability, a claimant cannot later reopen the claim for an additional award for that psychiatric disability, even if his claim for the psychiatric portion of his disability was originally denied.⁵¹

For a claimant to obtain a reopening, his petition must disclose that there has been a *worsening*,⁵² a "*progression or aggravation*" of his condition,⁵³ or "*some other fact or facts* which were not theretofore considered by the commissioner in his former findings, and which would entitle such claimant to *greater benefits* than he has already received."⁵⁴ If the petition fails to establish at least one

46. *Dickerson v. State Workmen's Compensation Comm'r*, 154 W. Va. 7, 13, 173 S.E.2d 388, 392 (1970); *Partlow v. Workmen's Compensation Comm'r*, 150 W. Va. 416, 420, 146 S.E.2d 833, 835 (1966).

47. *Stewart v. State Compensation Director*, 150 W. Va. 103, 108, 144 S.E.2d 327, 330 (1965).

48. *Burdette v. State Compensation Comm'r*, 111 W. Va. 299, 301-2, 161 S.E. 556, 557 (1931).

49. *Taylor v. Workmen's Compensation Comm'r*, 151 W. Va. 409, 151 S.E.2d 283 (1966).

50. *Perry v. State Workers' Compensation Comm'r*, 152 W. Va. 602, 607, 165 S.E.2d 609, 612 (1969).

51. *Taylor*, 151 W. Va. at 415, 151 S.E.2d at 286.

52. *Phillips v. State Compensation Comm'r*, 114 W. Va. 648, 651, 174 S.E. 561, 562 (1934).

53. W. VA. CODE § 23-5-1b (Rep. Vol. 1985).

54. *Id.*

of these criteria, the commissioner must issue a protestable order notifying the claimant and employer that the application fails to establish a *prima facie* cause for reopening the claim.⁵⁵ The court has held that the question of whether a *prima facie* cause has been established is one of fact, not law,⁵⁶ so each petition must be considered on its own merits.

Currently, a reopening petition is considered by one of the Fund's fifteen medical claims analysts assigned to that task. These analysts are not required to have any special medical or legal training; they are trained "on the job." Practitioners who deal with the Fund on a regular basis may find that the responses by these analysts to reopening petitions vary widely. While some strictly require objective medical findings which demonstrate a progression or aggravation of the claimant's condition, other analysts seem to interpret court decisions to mean that almost any evidence at all is sufficient to establish a *prima facie* cause for reopening.⁵⁷ For example, often a physician's stated opinion that there has been an "aggravation or progression" of the claimant's condition, without objective findings to support that opinion, is enough to obtain a reopening order.

Any party dissatisfied with the reopening order has the right to protest it. Furthermore, that party is entitled to a hearing if the protest is timely filed.⁵⁸

B. *Modifications*

For an employer to obtain modification of an award, the application must be in writing and *disclose a cause* for adjustment of the award.⁵⁹ The application for modification must disclose some fact or facts not theretofore considered by the commissioner in his

55. *Id.* (emphasis added).

56. *Perry*, 152 W. Va. at 608, 165 S.E.2d at 612.

57. In *Harper v. State Workmen's Compensation Comm'r*, 160 W. Va. 364, 234 S.E.2d 779 (1977), the court held that to obtain a reopening, a claimant need only provide "evidence which would tend to justify but not to compel the inference that there has been a progression or aggravation of a former injury," and that the Workers' Compensation Act should be "liberally construed." *Id.* at 370, 234 S.E.2d at 783.

58. W. VA. CODE § 23-5-1a (1985).

59. *Id.* § 23-5-1c.

former findings.⁶⁰ Practical experience demonstrates that the employer must present the commissioner with substantial evidence in order to be successful. An example would be a videotape showing the claimant engaging in activity contrary to his alleged injury.

The modification standard to which an employer is held appears to be stricter than is required of the claimant seeking a reopening. For example, the court has held that a PTD award can not be set aside except for "good cause," and in order to modify a PTD award, it must affirmatively appear that the claimant's condition had "materially improved" over that shown to exist when the PTD benefits were originally awarded.⁶¹ In one case, an employer's uncontroverted affidavits alleged that the claimant had worked at heavy manual labor for several months after a PTD award, and had been accorded no special privileges because of his physical condition. The court held that the employer was entitled to have the claim reopened for a hearing.⁶²

In considering an application for modification of TTD benefits, the commissioner is required to take into account any information supplied by the claimant, in addition to that supplied by the employer.⁶³ Additionally, the commissioner may rely on information already in the file and may refer the claimant to an independent medical evaluator before acting on the employer's application.⁶⁴ This contrasts sharply with the grounds for reopenings, in which the commissioner relies almost entirely on the claimant's evidence to determine if there is a *prima facie* cause for reopening.

As with reopenings, responses by the commissioner to applications for modification must be in the form of protestable orders. Such orders allow any objecting party a full evidentiary hearing.⁶⁵

60. *Id.* § 23-5-1d.

61. *Blosser v. State Compensation Comm'r*, 132 W. Va. 112, 126, 51 S.E.2d 71, 78 (1948).

62. *Id.*

63. *Mitchell v. State Workmen's Compensation Comm'r*, 163 W. Va. 107, 120, 256 S.E.2d 1, 10 (1979).

64. *Id.* at 120, 256 S.E.2d at 10-11.

65. W. VA. CODE §§ 23-5-1c, 23-5-1d (1985).

IV. THE COMMISSIONER'S SCOPE OF AUTHORITY

A. *Broad Powers*

The statute provides that the commissioner shall have "full power and authority to hear and determine all questions within his jurisdiction," including those pertaining to changes with respect to former findings or orders.⁶⁶ The commissioner's powers in this regard have been described by the court as "broad."⁶⁷

In a reopening or a modification proceeding, the commissioner may make such changes with respect to former findings or orders "as may be justified."⁶⁸ The court has held that a liberal interpretation must be given the statute.⁶⁹ As long as an award falls short of PTD, the claimant has the right to have his claim reopened, if he satisfies the requirements of the reopening statutes, i.e., filing the application within the prescribed time limits and establishing a *prima facie* cause.⁷⁰ Once a reopening or modification has been granted, the claimant is not restricted to those issues for which the reopening was requested.⁷¹ The claimant not only has the right to contest a modification with rebuttal evidence, or to develop fully the issues regarding progression or aggravation in his reopening petition, but he may also develop "any other facts which were not previously considered by the commissioner in his original findings."⁷²

B. *Time Constraints*

The primary restraint on the commissioner's continuous jurisdiction over a workers' compensation claim is the statutory time

66. *Id.* § 23-5-1.

67. *Honaker v. State Workmen's Compensation Comm'r*, 298 S.E.2d 893, 896 n.2 (W. Va. 1982).

68. W. VA. CODE §§ 23-5-1a, 23-5-1c (1985).

69. *Mitchell v. State Workmen's Compensation Comm'r*, 163 W. Va. 107, 114, 256 S.E.2d 1, 7 (1979); *Wilkins v. State Compensation Comm'r*, 120 W. Va. 424, 428, 198 S.E. 869, 871 (1938).

70. *Bragg v. State Workmen's Compensation Comm'r*, 152 W. Va. 706, 712, 166 S.E.2d 162, 165 (1969).

71. *Boggs v. State Workmen's Compensation Comm'r*, 163 W. Va. 413, 418, 256 S.E.2d 890, 893 (1979) (quoting *Harper v. State Workmen's Compensation Comm'r*, 160 W. Va. 364, 370, 234 S.E.2d 779, 783 (1977)).

72. *Boggs*, 163 W. Va. at 417, 256 S.E.2d 893 (1979).

limitations for filing applications for reopenings or modifications. The statute prohibits "further awards" from being made in fatal cases after two years from the date of death.⁷³ A further award for a non-fatal injury must be made within five years after payment of TTD benefits has ceased, or not more than two times within five years after the last PPD payment was made in the original award or any increase thereof.⁷⁴ If *no* award has been made in the claim, a change may be made only within five years after the date of injury.⁷⁵ A further award can be made for medical benefits at *any* time.⁷⁶

The court has held that these statutory time restraints are applicable only to the reopening of a claim previously closed by a commissioner's final (appealable) order.⁷⁷ These time periods are jurisdictional⁷⁸ and the commissioner cannot reopen a claim after the expiration of the relevant time period.⁷⁹ On the other hand, there does not appear to be any time constraints upon the employer in making an application for modification.

There are good reasons for time limitations on reopenings.⁸⁰ Without such limits, for example, the commissioner would have to preserve the full case record of all claimants who have ever received any kind of award. Even with microfiche and computerization, keeping records of all claims, and never being able to purge them, would be cost-prohibitive. Secondly, any attempt to reopen a claim on an ancient injury would necessarily present awkward problems of proof, since it would be difficult to determine the relationship between the

73. W. VA. CODE § 23-4-16 (1985).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Craft v. State Compensation Director*, 149 W. Va. 28, 33-34, 138 S.E.2d 422, 425 (1964).

78. W. VA. CODE §§ 23-5-1b, 23-5-1d; *Taylor v. Workmen's Compensation Comm'r*, 151 W. Va. 409, 415, 151 S.E.2d 283, 286-87 (1966); *Turner v. State Compensation Comm'r*, 123 W. Va. 673, 677, 17 S.E.2d 617, 619 (1941).

79. *Stroupe v. Workmen's Compensation Comm'r*, 151 W. Va. 415, 422, 152 S.E.2d 544, 548 (1967). The time periods for seeking a reopening may be extended or excused, however, if either party within a period of time equal to the applicable time period requests an extension, showing good cause or excusable neglect. In considering whether there was "good cause or excusable neglect," the commissioner may consider whether the applicant was represented by counsel and whether the applicant or its representative actually received timely and proper notice. W. VA. CODE § 23-5-1(e) (Supp. 1989).

80. *See*, 3 A. LARSON, *supra* note 1, § 81.10.

old injury and the present disability. Finally, the commissioner could never accurately determine, even with the best available actuarial studies, what kind of future liability the Fund could anticipate incurring for reopened claims and, therefore, would have difficulty computing appropriate reserves. The problems of anticipating liability would be a difficult, if not an impossible task for self-insured employers as well, if there were no time constraints on reopenings.

V. THE REVIEW PROCEDURE

A. *Due Process Afforded*

Throughout the statutes pertaining to reopening and modification of workers' compensation claims, the West Virginia Legislature has provided for due process of law for all parties.⁸¹ All parties must be given adequate notice and a chance to object and offer evidence. Adequate response time for an objection or appeal is allowed for the commissioner's rulings or orders,⁸² and the time periods can be extended if "good cause or excusable neglect" is shown by the applicant.⁸³

B. *Burdens of Proof*

1. Background

Generally, in a workers' compensation case a claimant has the burden of proving his claim⁸⁴ by a preponderance of the evidence.⁸⁵

81. The court has held that the purpose of the modification and reopening statutes is to afford employers and claimants "the right and opportunity, by a procedure substantially similar for each, to obtain, in a proper case, on grounds specified in the statutes, modification of any previous award." *Blosser v. State Compensation Comm'r*, 132 W. Va. 112, 123, 51 S.E.2d 71, 76-77 (1948).

82. W. VA. CODE §§ 23-5-1, 23-5-1b, 23-5-1d (1985 & Supp. 1989); *Id.* §§ 23-5-1a, 23-5-1c (1985).

83. W. VA. CODE § 23-5-1e (Supp. 1989). This language was added to the statute by the Legislature in 1986 in response to *Bailey v. State Workmen's Compensation Comm'r*, 296 S.E.2d 901 (W. Va. 1982), in which the court had held that the statutory time limits under the Workers' Compensation Act were *not* jurisdictional. *Id.* at 905. The statute restored the jurisdictional status of the time periods, but allowed an exception in appropriate cases. W. VA. CODE § 23-5-1e (Supp. 1989).

84. *E.g.*, *Myers v. State Workmen's Compensation Comm'r*, 160 W. Va. 766, 772, 239 S.E.2d 124, 127 (1977).

85. *Eady v. State Compensation Comm'r*, 148 W. Va. 5, 11, 132 S.E.2d 642, 646 (1963).

There have been several court decisions in the past two decades which have effectively lightened the "preponderance of the evidence" requirement applied in most civil cases. What is left is a *very* light burden of proof for the workers' compensation claimant.

The "Rule of Liberality" has done the most to lighten the claimant's burden of proof. That rule states that it is the duty of the commissioner to construe liberally the evidence in favor of the claimant.⁸⁶ While the Rule of Liberality is not found in today's West Virginia statute, the court began molding it soon after the genesis of the initial Workmen's Compensation Act passed in 1913.⁸⁷ It continues with unabated force to govern the construction of the Act to the present day,⁸⁸ even though the original statutory phrase "justly and liberally" was omitted from the Act in 1919,⁸⁹ and has not been restored to the statute. While the Rule of Liberality does not relieve the claimant of his burden to provide proper and satisfactory proof,⁹⁰ he can meet his burden of proof with circumstantial evidence.⁹¹ A claimant is not required to prove to the exclusion of all else, the causal connection between his injury and his employment.⁹²

In other workers' compensation laws we find variations of the Rule of Liberality which perhaps are more equitable. For example, in federal black lung cases, the courts have developed the "True Doubt Rule."⁹³ Under that rule, if the conflicting evidence is in equipoise, the claimant prevails. However, where conflicting evidence is not "equally probative," the rule is not applicable.⁹⁴ In

86. *E.g.*, *Buckalew v. State Compensation Director*, 149 W. Va. 239, 245, 140 S.E.2d 453, 456 (1965).

87. *Culurides v. Ott*, 78 W. Va. 696, 699, 90 S.E. 270, 271 (1916).

88. *E.g.*, *Dunlap v. State Workmen's Compensation Comm'r*, 160 W. Va. 58, 62-63, 232 S.E.2d 343, 345 (1977).

89. 1919 W. Va. Acts 465.

90. *Smith v. State Workmen's Compensation Comm'r*, 155 W. Va. 883, 887, 189 S.E.2d 838, 841 (1972).

91. *Sowder v. State Workmen's Compensation Comm'r*, 155 W. Va. 889, 892, 189 S.E.2d 674, 676 (1972).

92. *Id.*

93. *Conley v. Roberts and Shaefer Co.*, 7 Black Lung Rep. (MB) 1-309, 310 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 Black Lung Rep. (MB) 1-378, 384 (1983); *Provance v. United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 485 (1978).

94. *Conley*, 7 Black Lung Rep. at 310; *Kozele*, 6 Black Lung Rep. at 384; *Provance*, 1 Black Lung Rep. at 485.

federal black lung litigation, the trier of fact (the administrative law judge) has the discretion to determine if the evidence is "equally probative." If the ALJ's decision not to apply the "True Doubt Rule" is supported by substantial, rational evidence which is in accordance with law, that decision will not be disturbed upon appeal.⁹⁵

In contrast to the federal black lung system, the court in West Virginia workers' compensation cases frequently utilizes the Rule of Liberality to set aside the findings made by the triers of fact (the commissioner and Appeal Board). The court frequently has held that the Rule of Liberality means that the claimant must prevail if he has *any* evidence in support of his position, even where there is overwhelming evidence to the contrary from the employer and the commissioner's independent examiners.⁹⁶ For this reason, there are annual attempts by the employer community to legislatively modify the Rule of Liberality in West Virginia.

In short, the court has held that the burden of proof in workers' compensation cases is simply not as great for the claimant as that required in civil actions. Additionally, the court will not observe the rules of evidence as rigidly.⁹⁷

2. Reopenings

If possible, the court has made the burden of proof for a reopening even lighter than the burden of proof generally applied in workers' compensation litigation. The claimant is required only to establish a "prima facie cause" for the initial reopening of his claim.⁹⁸ The court has held that a "prima facie cause" means any evidence which would tend to justify, but not compel, an inference that there

95. *O'Keeffe v. Smith, Hinchman & Grylls Assocs. Inc.*, 380 U.S. 359 (1965). See also, *Mucker v. Director, OWCP*, 7 Black Lung Rep. (MB) 1-492 (1984); *Kozele*, 6 Black Lung Rep. (MB) 1-378.

96. See, e.g., *Helmandollar v. Workers' Compensation Comm'r*, No. 19099 (W. Va. October 19, 1989) (per curiam); *Heneger v. Workers' Compensation Comm'r*, No. 18935 (W. Va. May 16, 1989) (per curiam); *Francis v. Workers' Compensation Comm'r*, No. 18642 (W. Va. February 23, 1989) (per curiam). Although not directly related to reopening or modification, these cases are examples of the court applying the Rule of Liberality to justify reversing the findings of fact of the commissioner and Appeal Board, where the preponderance of the evidence weighed heavily against the claimant.

97. *Sowder*, 155 W. Va. at 893, 189 S.E.2d at 676.

98. W. VA. CODE § 23-5-1b (Supp. 1989). If there is no protest to the initial reopening ruling, the claimant is "home free"; a prima facie cause is all he will ever have to establish. *Id.*

has been a progression or aggravation of his former injury.⁹⁹ A prima facie showing does not always have to depend on a showing of a "progression or aggravation." It may depend on "some other fact or facts."¹⁰⁰ A claimant does not, however, demonstrate a prima facie cause merely by showing that his original PPD award was inadequate.¹⁰¹ The court has inferred that when the commissioner enters an order finding a prima facie cause for reopening and the employer protests and litigation ensues, the claimant's burden of proof increases to a preponderance of the evidence "blended" with the Rule of Liberality.¹⁰²

Clearly, if the medical evidence supporting a reopening is uncontradicted or the examining physicians are unanimous in their findings of progression or aggravation, then the claim must be reopened.¹⁰³ To the contrary, where examining physicians have found no physical disability entitling the claimant to a greater award, then the commissioner cannot, in the absence of rebuttal evidence, reopen the claim.¹⁰⁴

In the more typical case where there are conflicting medical reports and testimony, the commissioner must make an independent determination based on all of the evidence in the claim.¹⁰⁵ The commissioner sometimes "splits the difference" when there are differing opinions as to the degree of the claimant's disability, or relies on the independent examiner's opinion to make the award. Just as frequently, however, the "Rule of Liberality" is applied somewhat perfunctorily, and the opinion finding the greatest disability is adopted in the final order. Furthermore, the requirements for burden of proof

99. *Harper v. State Workmen's Compensation Comm'r*, 160 W. Va. 364, 370, 234 S.E.2d 779, 783 (1977).

100. *Bostic v. State Compensation Comm'r*, 142 W. Va. 484, 487, 96 S.E.2d 481, 483 (1957).

101. *Perry v. State Workmen's Compensation Comm'r*, 152 W. Va. 602, 607-08, 165 S.E.2d 609, 612 (1969).

102. *See, Harper*, 160 W. Va. at 367, 234 S.E.2d at 781.

103. *Kennedy v. State Compensation Director*, 150 W. Va. 132, 134-35, 144 S.E.2d 509, 510-11 (1965); *Buckalew v. State Compensation Director*, 149 W. Va. 239, 245, 140 S.E.2d 453, 456 (1965).

104. *Estes v. Workmen's Compensation Comm'r*, 150 W. Va. 492, 494, 147 S.E.2d 400, 402 (1966).

105. *Haines v. State Workmen's Compensation Comm'r*, 151 W. Va. 152, 156, 150 S.E.2d 883, 885 (1966).

can vary, from strict to very liberal, a situation which is aggravated by the Rule of Liberality.¹⁰⁶

3. Modifications

In contrast to the light burden of proof imposed upon the claimant for a reopening, the standard to which an employer is held in an application for modification is a stricter one. For example, a PTD award cannot be set aside unless it affirmatively appears that the claimant's present condition has "materially improved" over that shown to exist when the PTD benefits were originally awarded.¹⁰⁷ Showing that the claimant has returned to some other work is not necessarily sufficient to have a PTD award modified.¹⁰⁸ It is rare for the commissioner to grant an employer's application for modification of TTD benefits, even when there is evidence that the claimant has reached his maximum degree of improvement. The commissioner typically waits until the authorized treating physician or the independent examiner finds that the claimant has reached his maximum degree of medical improvement before terminating TTD. Although the court has held that the employer and claimant are to be afforded procedures "substantially similar" in their attempts to obtain modifications and reopenings,¹⁰⁹ the relevant burdens of proof produce a somewhat unlevel playing field, tilted in favor of claimants.

C. The Appellate Process

The appeal procedure for reopenings and modifications is the same as that for all workers' compensation matters. When a protestable order is issued, the parties have thirty days in which to object.¹¹⁰ If an objection is filed, evidentiary hearings are held and

106. See, *supra* Ch. V, § B, Subsection 1.

107. *Blosser v. State Compensation Comm'r*, 132 W. Va. 112, 126, 51 S.E.2d 71, 78 (1948).

108. *Linville v. State Workmen's Compensation Comm'r*, 160 W. Va. 549, 556, 236 S.E.2d 41, 45 (1977).

109. *Blosser v. State Workmen's Compensation Comm'r*, 132 W. Va. 112, 123, 51 S.E.2d 71, 76-77 (1948).

110. W. VA. CODE § 23-5-1. (1985 & Supp. 1989). Sixty days for appeal is the maximum permitted "regardless of notice." *Id.*

an appealable or "final" order is issued by the commissioner after the parties have "submitted" the claim for decision. If there is no appeal within thirty days after receipt of the final order, the commissioner's order becomes "forever final," since the time limits for appeal are jurisdictional.¹¹¹

1. The Appeal Board

Any party who feels "aggrieved," including the claimant, employer, or a dependent can, as a matter of right,¹¹² appeal any final order of the commissioner to the Workers' Compensation Appeal Board.¹¹³ The commissioner is named as one of the appellees in claims appealed to the Appeal Board.

Briefs may be filed by the parties,¹¹⁴ and oral arguments are permitted before the Board.¹¹⁵ The Board may affirm or reverse the final order of the commissioner or, "for good cause shown," remand the case to the commissioner "for the taking of such new, additional, or further evidence as in the opinion of the board may be necessary for a full and complete development of the facts of the case."¹¹⁶ It may remand the case as often as is necessary,¹¹⁷ and can accept evidence or consider ex parte statements in support of motions to remand.¹¹⁸

The Appeal Board hears matters de novo;¹¹⁹ it does not merely review questions of law. Although it rarely does so, the Board can even take additional testimony.¹²⁰ The Board displaces the commis-

111. *Id.*

112. An appeal to the Appeal Board is a matter of right; it is not granted for error. *See, e.g., Taylor v. Workmen's Compensation Comm'r*, 151 W. Va. 409, 151 S.E.2d 283 (1966).

113. W. VA. CODE § 23-5-3. The Appeal Board is a three-member panel appointed by the governor. *Id.* § 23-5-2 (1985).

114. *Id.* § 23-5-3 (1985 & Supp. 1989). The Appeal Board currently will not consider an appeal, however, unless a brief is submitted by the appellant, where the appellant is represented by counsel.

115. *Id.* Presently a minority of appeals are argued orally and most of the arguments are short.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Dillon v. State Compensation Comm'r*, 129 W. Va. 223, 226, 39 S.E.2d 837, 839 (1946).

120. *See, e.g., Rasmus v. Workmen's Compensation Appeal Bd.*, 117 W. Va. 55, 184 S.E. 250 (1936).

sioner and becomes the sole fact-finding body in the case.¹²¹ The findings and the presumptions of the commissioner wholly disappear, and the order of the Board supersedes the commissioner's final order for all purposes.¹²²

Generally, the Board does not accept new evidence.¹²³ The commissioner's level is a forum better suited for the submission of new evidence, the cross-examination of witnesses, and the building of a record. The Board usually remands when further evidentiary development is needed.¹²⁴

2. The West Virginia Supreme Court of Appeals

Either of the parties or the commissioner may apply to the West Virginia Supreme Court of Appeals for review of any final decision by the Appeal Board.¹²⁵ Such an application must be made within thirty days from the date of the Appeal Board's final decision.¹²⁶ The court then determines whether a review is to be granted.¹²⁷

The court's scope is limited; it should not disturb an Appeal Board finding unless it determines that (i) the Appeal Board was "clearly or plainly wrong,"¹²⁸ (ii) the Board's legal conclusions were erroneous,¹²⁹ (iii) the Board's decision was not supported by the evidence,¹³⁰ or (iv) the Appeal Board's ruling was clearly against the

121. *Id.* at 58, 184 S.E. at 252.

122. *E.g.*, *Dunlap v. State Workmen's Compensation Comm'r*, 152 W. Va. 359, 364, 163 S.E.2d 605, 608 (1968).

123. In one case, where the claimant had postponed a medical examination until eleven days after the commissioner had denied his application to reopen for lack of proof, the court held that the Appeal Board did not abuse its discretion in refusing to consider the medical report and in refusing to remand the case back to the commissioner for evidentiary development. *Willard v. State Workmen's Compensation Comm'r*, 155 W. Va. 114, 181 S.E.2d 278 (1971).

124. In an appeal concerning reopenings, the court has held that the Appeal Board has the power only to determine whether the claim should be reopened, and cannot order the commissioner to give a particular rating of disability which the Board fixes. *Felty v. Compensation Comm'r*, 124 W. Va. 75, 78, 19 S.E.2d 90, 91 (1942).

125. W. VA. CODE § 23-5-4 (Supp. 1989).

126. *Id.*

127. *Id.*

128. *E.g.*, *Backus v. State Workmen's Compensation Comm'r*, 154 W. Va. 79, 83, 173 S.E.2d 353, 355 (1970).

129. *Emmel v. State Compensation Director*, 150 W. Va. 277, 284, 145 S.E.2d 29, 34 (1965).

130. *E.g.*, *Smith v. State Workmen's Compensation Comm'r*, 155 W. Va. 883, 888, 189 S.E.2d 838, 841 (1972).

preponderance of the evidence.¹³¹ The findings of fact by the Appeal Board have the same weight as that accorded a trial judge.¹³² While its scope of review has been defined as a limited one, in recent years there has been a trend for the court to accept workers' compensation claims for review, even where the findings of fact by the commissioner and Appeal Board have been identical and were supported by substantial evidence. Frequently, the Rule of Liberality is used as the basis for reversing the order of the Appeal Board.¹³³

A workers' compensation tribunal may only apply its own state's law,¹³⁴ so it is almost unheard of for an appeal to proceed beyond the state supreme court. Once the court has refused the appeal, or reviews the case and issues an order, the litigation process usually concludes.¹³⁵ Workers' compensation cases involving federal issues are rarely heard at the federal level.¹³⁶

VI. CONCLUSION

Claimants, employers, and dependents must follow a relatively simple procedure to seek a change in previous workers' compensation awards in West Virginia. A claimant must timely file his reopening petition and provide some evidence of a progression or aggravation of his compensable condition or provide some new fact or facts. To succeed with an application for modification, an employer must disclose a cause for adjustment and provide some new

131. See, e.g., *Barkley v. State Workmen's Compensation Comm'r*, 164 W. Va. 777, 266 S.E.2d 456 (1980).

132. W. VA. CODE § 23-5-4a (1985).

133. See *supra* note 93.

134. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) *rev'g* 598 F.2d 617 (4th Cir. 1979) (unpublished opinion).

135. In 1983, 116 workers' compensation petitions were filed with the court, 75.49% being granted. In 1984, 162 workers' Compensation petitions were filed with 80.26% being granted. In 1985, 198 were filed and 55.5% were granted. In 1986, 421 were filed with 56.58% granted. In 1987, 841 were filed with 47.92% granted. In 1988, 488 workers' compensation petitions were filed with 56.85% of those being granted for hearing. Workers' compensation claims represented 10% of all of the cases the court considered in 1983; 12.6% in 1984; 14.4% in 1985; 26.5% in 1986; 43.7% in 1987, and 30% in 1988. Telephone interview with Ancil G. Ramey, Clerk of the West Virginia Supreme Court of Appeals (January 17, 1990). Most of the court's workers' compensation decisions are issued in per curiam, unpublished form.

136. See, e.g., *Cobb v. Unison Transformer Services, Inc.*, No. 2:88-1404, (S.D. W. Va. 1989).

fact not considered by the commissioner. A two-tiered appellate system is available to litigants dissatisfied with final reopening or modification orders by the commissioner.

Although West Virginia workers' compensation law purports to provide both the claimant and the employer with an equivalent system for amending previous awards, in practical terms that is not the result. Because of various procedural provisions and the Rule of Liberality, the claimant has a much lighter burden of proof than the employer. The Rule of Liberality pervades all workers' compensation litigation issues in West Virginia; it has generated increased awards to claimants who have provided minimal evidence of progression or aggravation of their compensable conditions.

Employers are proponents of a more equitable liberality rule, such as the federal black lung "True Doubt Rule." The workers' compensation system, in and of itself, is different from other areas of civil law. It is intended to be remedial in nature. Both claimants and employers gained protection and lost privileges when the workers' compensation systems were established in the United States early in this century. The employer gained protection from nearly all employee lawsuits pertaining to occupational injuries and diseases, and some predictability as to the cost of such claims. In exchange for surrendering the right to sue, the claimant gained a system financed by employers where he did not have to prove fault and where the common law defenses of contributory negligence, assumption of risk, and the Fellow Servant Rule were not applicable; that was the "trade-off." As a result of the unique nature of workers' compensation, *res judicata* and collateral estoppel rarely apply.

There is constant discussion in West Virginia concerning the possibilities of modifying both the liberal reopening provisions and the Rule of Liberality, because of skyrocketing costs. Perhaps it is time for the Legislature to revisit these issues to determine what changes can be made to restore a more level playing field for all parties.